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IN THE

Supreme Court of the United States

October Term, 1966

No. 660 Misc.

KENNETH JACOBS, FLORENCE KARPF and JONAS MEKAS,

Appellants,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above-entitled action on the grounds that the appeal (1) is moot and (2) does not present a substantial federal question.

Jurisdiction

The appellants seek to invoke this Court's jurisdiction under 28 U. S. C. §1257(2) by contending that Section 1141 of the New York Penal Law, as construed and applied to this case, violates the "due process" clause of the Fourteenth Amendment and the guarantees of freedom of speech and freedom of the press of the First Amendment, applicable to the States through the Fourteenth Amendment.

The Statute Involved

Section 1141 of the New York Penal Law, in pertinent part, reads as follows:

> "1. A person who sells, lends, gives away, distributes, shows or transmutes * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic * * * motion picture film * * * which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character * * *
>
> "2. Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment. * * *"

Questions Presented

1. Does mootness command the dismissal of the appeal?

2. Is the film in question obscene?

3. Does proof of the appellant's knowledge of the contents of the film satisfy the requirement of scienter?

4. Does due process compel the trial court to accept all evidence offered by the defense in its attempt to establish the current community standards and the social importance of the material at issue?

Statement

The appellants were convicted on June 12, 1964, after trial in the Criminal Court of the City of New York, New York County, of violating Section 1141 of the Penal Law. On August 7, 1964, appellants Kenneth Jacobs and Jonas Mekas were each sentenced to sixty days' imprisonment, execution of the sentence was suspended. Appellant Florence Karpf was given a suspended sentence.

The Appellate Term, First Department, unanimously affirmed the judgment of conviction on December 9, 1965, and Honorable STANLEY H. FULD denied leave to appeal to the Court of Appeals on April 15, 1966.

THE EVIDENCE

I. The People's Case

On March 3, 1964, a motion picture made by Jack Smith entitled "Flaming Creatures" (People's Exh. 2) was shown at the New Bowery Theatre at 4 St. Marks Place in New York City (20-1).* Appellant Jonas Mekas arranged for the showing of the film (79), appellant Kenneth Jacobs conducted the actual showing (28-31) and appellant Florence Karpf acted as ticket seller (21-2, 36-40). Each appellant was thoroughly familiar with the content of the film, but all denied to the arresting officers that the film was obscene (35, 78-80).

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* All references are to the pages of the Record on Appeal.

II. The Defense

Susan Sontag, a teacher and a writer, testified that she had seen "Flaming Creatures," and that her review of the film had appeared in the publication "The Nation" on April 13, 1964 (Defendants' Exh. E). Objections to questions put to the witness concerning her opinion on whether the film appealed to prurient interests and was pornographic were sustained (197-9).

Joseph Kaster, member of the faculty of the school of Social Research, testified that he showed "Flaming Creatures" to his adult class as part of his instruction on witchcraft, magic and sorcery as they relate to the myths and rituals in Western Civilization (246-7). He testified that there is a definite parallel between "Flaming Creatures" and the Dionysian myth (248-9). He was not allowed to give his opinion as to whether the film was hard-core pornography (249-51).

Richard Leslie Trumbull, a volunteer clerk for the Film Makers' Co-operative, an informal organization dedicated to gain distribution for the films of its members, testified that on the date the appellants were arrested, the film "Flaming Creatures" was being shown at a benefit for the Film Makers' Co-operative, and that one of the purposes of the showing was to raise money for the maker of the film, Jack Smith (255, 259-61, 266). He also testified that a public notice for the showing was put in a newspaper called the *Village Voice* (267).

The following testimony offered by the defense was rejected by the court as incompetent and irrelevant:

1. The opinion of **Louis Allen**, theatre and film producer, that "Flaming Creatures" is a work of art and does not appeal to the prurient interests of adult people (137-62).

2. The opinion of **Willard Van Dyke**, documentary motion picture producer, that "Flaming Creatures" is a work of art with regards to its cinematographic techniques and that the film does not arouse prurient interests (162-72).

3. The opinion of **Herman Weinberg**, film historian and teacher at the City College of New York, that the film is not hard-core pornography, but rather an aesthetic work of art (172-87).

4. The opinion of **Shirley Clark**, a motion picture director, that "Flaming Creatures" is not hard-core pornography but a film of artistic value (236-43).

5. The opinion of **Allen Ginsberg**, a poet, that the film has social importance and does not appeal to prurient interests (270-72).

6. The opinions of two psychiatrists, Dr. **Edward Hernich** and Dr. **John Thompson**, that "Flaming Creatures" does not excite the viewer to abnormal behavior, and that the film is not obscene (281-9).

POINT I

The appeal is moot.

In *St. Pierre* v. *United States*, 319 U. S. 41, 42-43 (1943), this Court, in dismissing a certiorari petition, held:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it (cits. om.). The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the terms of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

Under the criteria of *St. Pierre*, the instant appeal is moot as to all of the appellants. In August of 1964, the appellants were given suspended sentences. For the next year, the maximum time for which the appellants could have been sentenced [New York Penal Law §1141(2)], the sentencing court could have revoked the suspended sentences and imposed prison sentences [New York Code of Crim. Proc. §470-a]. Now, the year having run and the sentencing court thus having lost its power over the appellants, their appeal is moot unless they show legal "disabilities" flowing from the judgment of conviction [*St. Pierre* v. *United States, supra* at 43; see *Fiswick et al.* v. *United States*, 329 U. S. 211, 221-222 (1946)]. The appellants allege no such disabilities nor could they, for neither New York nor federal law imposes any further penalty upon conviction of the misdemeanor here in issue. The case is moot and should therefore be dismissed.

POINT II

No substantial federal questions are presented.

(1) The Film "Flaming Creatures" is Obscene.

The film entitled "Flaming Creatures" is a 16 mm. black and white, sound production, running forty-two minutes. It is comprised of several separable sequences, all of them depicting some form of transvesticism or abnormal sexual behavior. One of the sequences concerns a sexual attack upon a female by four individuals, some dressed as women, with the camera focusing at times on the "victim's" bare breast which is being violently shaken by a participant in the assault, and dwelling at other times on the subject's uncovered pubic area which is being massaged by another attacker. In other sequences, there are numerous scenes of male masturbation. Such depictions of penises and pubic regions, portrayed in the perverse manner they are here, debase both the sexual act and the human body and are clearly hard-core pornography. These patently offensive scenes, comprising the predominant part of the film, have no possible social or artistic value, and the trial court as well as the appellate court were justified in determining that the film, which was shown commercially to the general public, is obscene.

The appellants not only contest the trial court's ultimate determination on the issue of obscenity, but argue that the judgment must be vacated simply because the People offered no proof that the film appealed to prurient interests, violated contemporary community standards, and was without redeeming social importance.

This Court in *Roth* v. *United States,* 354 U. S. 476 (1957), endorsed as a test of obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests" [*id.* at 489]. Moreover, it was held that the material must be utterly without social importance and patently offensive in that it goes substantially beyond customary limits of candor in representing sexual matters [*id.* at 484; *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482-486 (1962)]. This Court recently reaffirmed all of these standards [*Jacobellis* v. *Ohio,* 378 U. S. 184, 191-192 (1964)]. Commercial exploitation through advertising emphasis on the appeal to the prurient, a criterian advanced in *Ginzburg* v. *United States,* 383 U. S. 463 (1966), to be used as an additional aid in determining the character of borderline material, is not an issue here. Although the commercial showing of the film was advertised in a local paper, there was no claim that the advertisement contributed to the film's pornographic quality.

There are actually three separate standards upon which constitutional protection rests, any one of which can support the lawful dissemination of material. Each standard must necessarily be judged independently. Due to the fact that subtle artistic merit is sometimes beyond the aesthetic appreciation of the average man, the standard of redeeming social value must be judged by the courts, perhaps, in some cases, with the aid of experts and critics. "Appeal to the prurient interest" must be taken literally and alone, and must be judged in terms of the audience for which the material is designed and the susceptibility of those the material is likely to reach [*Mishkin* v. *New York,* 383 U. S.

502 (1966)]. Where, as here, the pornography involved is the hard-core variety, easily discernible without special expertise, the people certainly may rely upon the material itself to establish a *prima facie* case as to its lack of social importance and its appeal to the prurient [*Womack* v. *United States*, 294 F. 2d 204 (D. C. Cir. 1961); *People* v. *Finkelstein*, 11 N. Y. 2d 300, 305 (1962), cert. denied 371 U. S. 863 (1962)].

The decision of Judge Moore in *United States* v. *Klaw*, 350 F. 2d 155 (2d Cir. 1965), does not compel the acceptance of the appellants' argument that the People failed to prove prurient appeal. The *Klaw* case held that the conviction for the circulation of sado-masochistic literature alleged to appeal to the prurient interests of the deviate must be reversed because there was nothing presented to the jury which would enlighten them as to the nature of the appeal of the "bondage" material. This holding goes far beyond any pronouncements of the United States Supreme Court and is clearly not the law in New York. Moreover, the opinion is confined to the question of the prosecution's responsibility of proving the prurient appeal of the atypical material there involved, and does not apply to material whose appeal is easily detectable from its face.

Patent offensiveness must be evaluated in terms of contemporary community standards, and this is always the domain of the average man who is the most expressive and understanding of the community's tolerance. Clearly the trier of fact is competent, without the assistance of the prosecution, to determine the community's current attitudes on what is patently offensive by applying common sense, experience and the knowledge which comes from being a member of the community. The issue of whether the People

must establish the standards of the community is now before this Court in *Phelper* v. *Decker*, #374 Oct. 1966 Term, certiorari having been granted.

(2) *Scienter* was Established.

A conviction under Section 1141 cannot be upheld without proof of the element of *scienter* [*People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961)], and the appellants claim that *scienter* was not established by the evidence presented at their trial. Although the appellants admit their familiarity with the film's content, they contend, in essence, that their knowledge must cover both fact and law, and that they must be shown to have believed that the film would be classified obscene by judicial determination. In the absence of a prior restraint upon the particular material, this would necessarily call for an assessment of the outcome of an adjudication all but impossible for even the most trained and knowledgeable lawyers to make. Moreover, guilt cannot depend upon the offender's own appraisal of the legal significance of his conduct, for then a man could acquit himself by his own belief in his innocence. The defense of "honest mistake," insofar as it should be available, cannot refer to the mistake of law the appellants claim they made, but must describe a mistake in factual evaluation. In *Ginzburg* v. *United States, supra,* the defendant believed that his material was protected by prior Supreme Court rulings, yet his belief did not prevent his conviction, for he knew precisely the contents of his publication. In sum, *scienter* is established when it is proved that the accused was not ignorant of the facts upon which his liability is predicated. Moreover, precisely this issue was argued to this Court in *Redrup* v. *New York*, #3 Oct. 1966 Term.

(3) The Opinion Testimony Offered by the Defense to Establish that the Film was Not Obscene, and the Comparison Evidence Offered to Establish Current Community Standards was Properly Excluded as Irrelevant and Incompetent.

At the trial, the defense sought to present the opinions of various witnesses connected with the arts and the motion picture industry that the film "Flaming Creatures" was not hard-core pornography. The appellants also offered the opinions of two psychiatrists that the film was not obscene. All of this testimony was properly rejected. The personal opinion of any individual on the issue of whether a particular item is obscene—regardless of the individual's training in the arts, sociology or psychiatry—has no relevancy to the ultimate question before the court, which must be decided upon the basis of what is patently offensive to the average man applying present-day community standards [*Manual Enterprises v. Day,* 370 U. S. 478 (1962); *Roth* v. *United States,* 354 U. S. 476 (1957)].

The appellants claim, however, that the testimony of the witnesses who were versed in the arts was offered to establish the redeeming social importance of the film, and the exclusion of their testimony precluded the presentation of such a defense. But the record clearly shows that the questions put to these witnesses called more for their opinions regarding prurient appeal, community standards and hard-core pornography than for their critical evaluation of the artistic content of the film (145-7, 170-1, 181, 239-40, 274-5). When the defense offered a published critical review of "Flaming Creatures," untainted by unqualified conclusions as to its standing under the law, the article was admitted into evidence and the author allowed to elaborate

upon her opinion regarding the film's artistic merit (190-222). Testimony concerning the use of the motion picture as an instructual aid in an adult mythology course was also admitted into evidence (246-9). Thus, the court did not prevent the defense from attempting to establish the film's redeeming social importance, it only rejected incompetent offers of proof.

The appellants also sought to introduce testimony at the trial to establish that several motion pictures considered by the witnesses presented to be comparable in content to the instant film, were at that time in national distribution (154-6, 199-200, 203-5). This testimony, offered for the purpose of showing what the community's standards are, was excluded by the court as incompetent. The authority in New York for such exclusion is *People* v. *Finkelstein*, 11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962). In that case, the defendant, after eliciting from the police witness testimony that certain named magazines had been seen by the officer on newsstands in New York City, offered them in evidence as a standard for comparison with the exhibits in the case. The New York Court of Appeals sustained the trial court's exclusion of such evidence:

> "Finally, [the defendant] suggests that the trial court erred in refusing to receive evidence allegedly bearing upon current community standards regarding obscenity * * *. Counsel offered a book and magazines in evidence 'to indicate to your Honors what is the current standard in the community, of literature, and by comparing them you will see whether or not they are permissible.'
>
> "In our opinion, the proffered evidence was properly excluded, as it was irrelevant to the issue of

whether or not the two books sold by the defendants in this case were obscene. The different publications were *seen* in bookstores and on magazine stands in New York City is no indication that they were *sold*, or *read*, or that to the average person applying contemporary community standards (*Roth* v. *United States, supra*) they were not obscene" (305). (Italics in original.)

In the instant case, the mere circulation of other films does not establish that the public has accepted these offerings as being within the community standards of permissible candor.

Nor has this Court ever ruled that due process compels the acceptance of comparison evidence in obscenity prosecutions. Justice HARLAN, in an opinion which was part concurrence and part dissent in *Smith* v. *California*, 361 U. S. 147, 172 (1959), made the following observation concerning the exclusion of oral expert testimony on the issue of community standards:

"I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. * * *. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof." [361 U. S. at 172.]

New York has determined that evidence such as that offered by the appellants is not competent to establish the standards of the community. Due process does not remand another result.

Conclusion

The appeal should be dismissed, or the judgment below affirmed.

Respectfully submitted,

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